UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
61 Forsyth Street
Atlanta, Georgia 30303-3104

May 28, 2015
Mr. Ronnie Thompson, President
Montgomery Village Residents Association
1417 Daylilly Drive, Apartment 292
Knoxville, TN 37920

Dear Mr. Thompson:

It was great to meet you, and discuss the Smokey Mountain Smelters Site and Montgomery Village.

We look forward to a productive continuing dialogue on potential site reuses, and further site remedial efforts there. The involuntary acquisition policy for governments is included per our discussion.

If I may be of service, don't hesitate to contact me at (404) 562-9120 or via Internet email at miller.scott@epa.gov.

Thank you,

Scott Miller
Remedial Project Manager
U.S. Environmental Protection Agency

United States Environmental Protection Agency

Office of Enforcement and Compliance Assurance

December 1995

EPA

The Effect of Superfund on Involuntary Acquisitions of Contaminated Property by Government Entities

Office of Site Remediation Enforcement

Quick Reference Fact Sheet

Units of state, local, and federal government sometimes involuntarily acquire contaminated property as a result of performing their governmental duties. Government entities often wonder whether these acquisitions will result in Superfund liability. This fact sheet summarizes EPA's policy on Superfund enforcement against government entities that involuntarily acquire contaminated property. This fact sheet also describes some types of government actions that EPA believes qualify for a liability exemption or a defense to Superfund liability.

Introduction

EPA's Brownfields Economic Redevelopment Initiative is designed to help states, communities, and other stakeholders in economic redevelopment to work together in a timely manner to prevent, assess, safely clean up, and sustainably reuse brownfields. Brownfields are abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination. Many municipalities and other government entities are eager for brownfields to be redeveloped, but often hesitate to take any steps at these facilities because they fear that they will incur Superfund liability.

This fact sheet answers common questions about the effect of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly known as Superfund, and set forth at 42 United States Code beginning at Section 9601) on involuntary acquisitions by government entities. EPA hopes that this fact sheet will facilitate government entities' plans for redevelopment of brownfields and the "brokerage" of those facilities to prospective purchasers.

What is an involuntary acquisition?

EPA considers an acquisition to be "involuntary" if it meets the following test:

- The government's interest in, and ultimate ownership of, the property exists only because **the actions of a non-governmental party give rise to the government's legal right to control or take title to the property.**

For example, a government's acquisition of property for which a citizen failed to pay taxes is an involuntary acquisition because the citizen's tax delinquency gives rise to the government's legal right to take title to the property.

Similar to the examples listed in CERCLA, EPA's list of categories of involuntary acquisitions is non-exhaustive. To determine whether an activity not listed in CERCLA or under the Lender Policy is an "involuntary acquisition," one should analyze whether the actions of a non-governmental party give rise to the government's legal right to control or take title to the property.

If a government entity takes some sort of voluntary action before acquiring the property, can the acquisition still be considered "involuntary"?

Yes. Involuntary acquisitions, including the examples listed in CERCLA, generally require some sort of discretionary, volitional action by the government. A government entity need not be completely "passive" in order for the acquisition to be considered "involuntary" for purposes of CERCLA. For further discussion, see 57 *Fed. Reg.* 18372 and 18381.

Will a government entity that involuntarily acquires contaminated property be liable under CERCLA to potentially responsible parties and other non-federal entities?

If a unit of state or local government involuntarily acquires property through any of the means listed in CERCLA, it will be exempt from CERCLA liability as an owner or operator. In addition, any government entity will have a third-party defense to CERCLA liability if all relevant requirements for that defense are met (see above).

If a government entity acquires property through any other means, it appears likely — based on the way that courts have treated lender issues during the last few years — that a court would apply principles and rationale that are consistent with EPA and DOJ's Lender Policy. Analysis of these acquisitions may require an examination of case law and state or local laws.

If someone dies and leaves contaminated property to a government entity, is this considered an involuntary acquisition?

No, this type of property transfer is not considered an involuntary acquisition under CERCLA. However, CERCLA provides a third-party defense for parties that acquire property by inheritance or bequest (a gift given through a will). Thus, a government entity that acquires property in this manner will have a third-party defense to CERCLA liability if all relevant requirements of that defense are met and the government entity has not caused or contributed to the release or threatened release of contamination from the property (see above). For more information, see 42 U.S.C. 9607(b)(3) and 9601(35)(A) and (D).

Will a government entity that uses its power of eminent domain be liable under CERCLA?

After a government entity acquires property through the exercise of eminent domain (the government's power to take private property for public use) by purchase or condemnation, it will have a third-party defense to CERCLA liability if all requirements for that defense are met (see above). For more information, see 42 U.S.C. 9607(b)(3) and 9601(35)(A).

Will parties that purchase contaminated property from government entities also be exempt from CERCLA liability?

No. Nothing in CERCLA allows non-governmental parties to be exempt from liability after they knowingly purchase contaminated property. However, EPA encourages prospective purchasers of contaminated property to contact their state environmental agencies to discuss these properties on a site-by-site basis. At sites where an EPA action has been taken, is ongoing, or is anticipated to be undertaken, various tools, including "prospective purchaser agreements," may be an option.

For Further Information

The Lender Policy was published in the *Federal Register* in Volume 60, Number 237, at pages 63517 to 63519 (December 11, 1995).

You may order copies of the Lender Policy from the National Technical Information Service (NTIS), U.S. Department of Commerce, 5285 Port Royal Rd., Springfield, VA 22161. Orders must reference NTIS accession number **PB95-234498**. For telephone orders or further information on placing an order, call NTIS at **703-487-4650** for regular service or **800-553-NTIS** for rush service. For orders via e-mail/Internet, send to the following address:

orders@ntis.fedworld.gov

If you have questions about this fact sheet, contact Laura Bulatao of EPA's Office of Site Remediation Enforcement at (202) 564-6028.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE

JUNE 30, 1997

MEMORANDUM

SUBJECT: Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities

FROM: Barry Breen, Director
Office of Site Remediation Enforcement

TO: Addressees listed below

This memorandum transmits the policy of the U.S. Environmental Protection Agency (EPA) for interpreting the provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) that address (1) lenders and (2) government entities that acquire property involuntarily. The Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 (the "Asset Conservation Act") amends the secured creditor exemptions under CERCLA and Subtitle I of the Resource Conservation and Recovery Act (RCRA). The Asset Conservation Act also validates the portion of EPA's "CERCLA Lender Liability Rule" that addresses involuntary acquisitions by government entities.

The attached policy clarifies the circumstances in which EPA intends to apply as guidance the provisions of the CERCLA Lender Liability Rule and its preamble in interpreting CERCLA's amended secured creditor exemption. The document also reminds its readers of the effects of the portion of the CERCLA Lender Liability Rule and the sections of the preamble that address involuntary acquisitions by government entities.

If you have any questions about this policy, please contact Laura Bulatao at (202) 564-6028.

Attachment

Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities

I. Introduction

This document sets forth the policy of the U.S. Environmental Protection Agency (EPA) for interpreting the provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) that address (1) lenders and (2) government entities that acquire property involuntarily. The Asset Conservation, Lender Liability, and Deposit Insurance Protection Act (the "Asset Conservation Act" or "Act"), 110 Stat. 3009-462 (1996), amends CERCLA's secured creditor exemption. Using language very similar to the language of EPA's "CERCLA Lender Liability Rule" (or "Rule"), the amendments define key terms and list activities that a lender may undertake without forfeiting the exemption. *See* "Final Rule on Lender Liability Under CERCLA," 57 Fed. Reg. 18344 (April 29, 1992).[1] (The portion of the Rule addressing lenders remains vacated by a court, as described in section II below.) In addition to amending CERCLA's secured creditor exemption, the Asset Conservation Act validates the portion of the CERCLA Lender Liability Rule that addresses involuntary acquisitions by government entities. It also amends Section 9003(h)(9) of the Resource Conservation and Recovery Act (RCRA), which provides a secured creditor exemption pertaining to underground storage tanks (USTs).

Prepared in consultation with the U.S. Department of Justice (DOJ), this policy clarifies the circumstances in which EPA intends to apply as guidance the provisions of the CERCLA Lender Liability Rule and its preamble in interpreting CERCLA's amended secured creditor exemption. This document also reminds its readers of the effects of the portion of the CERCLA Lender Liability Rule and the sections of the preamble that address involuntary acquisitions by government entities.

II. Background

As enacted in 1980, Section 101(20)(A) of CERCLA exempted from the definition of "owner or operator" "a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." This language left lenders and other secured creditors uncertain as to which types of actions -- such as monitoring vessel or facility operations, requiring compliance with applicable

[1] Except to the extent that the CERCLA lender liability provisions apply to Subtitle I of the Resource Conservation and Recovery Act (RCRA) pursuant to the amended Section 9003(h)(9) of RCRA (see the end of section II below), this policy does not address lender liability under any statutory or regulatory authority, rule, regulation, policy, or guidance, other than CERCLA. Specifically, this policy does not modify the "UST Lender Liability Rule" issued by EPA on September 7, 1995 (40 CFR 280.200-280.230).

exemption by defining key terms and listing activities that a lender may undertake without forfeiting the exemption. Additionally, Section 2504 of the Act validates the portion of the CERCLA Lender Liability Rule that addresses involuntary acquisitions by government entities.

The Asset Conservation Act also addresses lender liability under Section 9003(h)(9) of RCRA. Section 2503 of the Act amends Section 9003(h)(9) of RCRA to protect holders of security interests both as owners and operators of USTs. It also amends Section 9003(h)(9) of RCRA to provide the following: the CERCLA lender provisions apply in determining a person's liability as an owner or operator of an UST; however, where those provisions are inconsistent with the "UST Lender Liability Rule" issued by EPA on September 7, 1995 (40 CFR 280.200-280.230), that rule will prevail.

As a result of the enactment of the Asset Conservation Act, EPA and DOJ have withdrawn their 1995 Enforcement Policy, and EPA is now issuing the policy statement below to provide guidance on interpreting CERCLA's lender and involuntary acquisition provisions.

III. Policy Statement

A. Lenders and Other Secured Creditors

In light of the substantial similarities between CERCLA's amended secured creditor exemption and the CERCLA Lender Liability Rule, where the Rule and its preamble provide additional clarification of the same or similar terms used in the secured creditor exemption, EPA intends to treat those portions of the Rule and preamble as guidance in interpreting the exemption. For example, when interpreting the term "primarily to protect a security interest," EPA may consult the portions of the CERCLA Lender Liability Rule that discuss that term. As another example, when determining whether a lender is seeking to divest itself of a foreclosed upon facility "at the earliest practicable, commercially reasonable time, on commercially reasonable terms," EPA may consult the portions of the Rule that describe how a lender may establish that it is undertaking to divest itself of the property "in a reasonably expeditious manner, using whatever commercially reasonable means are relevant or appropriate" and that it is continuing to hold that property "primarily to protect a security interest."

B. Involuntary Acquisitions by Government Entities

As noted above, Section 2504 of the Asset Conservation Act validated the portion of the CERCLA Lender Liability Rule that addresses involuntary acquisitions by government entities. 40 CFR 300.1105 is therefore legally applicable to the interpretation of CERCLA §§ 101(20)(D) and 101(35)(A), the provisions that address involuntary acquisitions by government entities. Similar to the preamble to any valid regulation, the preamble to the CERCLA Lender Liability Rule will be looked to as authoritative guidance on the meaning of the portion of the Rule